Employers' Federation of Hong Kong
香港僱主聯合會

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3 June 2019

Hon Christopher Cheung Wah-fung, SBS, JP
Chairman
Bills Committee on Occupational Retirement Schemes (Amendment) Bill 2019
Legislative Council
Legislative Council Complex
1 Legislative Council Road
Central, Hong Kong

Dear Hon. Cheung,

Occupational Retirement Schemes (Amendment) Bill 2019

Thank you for inviting views on the Occupational Retirement Schemes (Amendment) Bill 2019 ("the Bill") on 21 May 2019. The Employers' Federation of Hong Kong has conducted rounds of discussions with the MPFA on this subject, and we appreciate the support from both the Financial Services and the Treasury Bureau and the MPFA, which have attempted to strike a balance between facilitating business operation in Hong Kong, and regulating the retirement market. We would like to elaborate here our position and detailed comments on the Bill.

The Federation certainly agrees that retirement schemes should be employment-based, and we support enhancing the protection of employees through reasonable and appropriate regulatory measures. However, there is indeed a genuine need for certain Hong Kong employers to utilise the exemption certificates under the Occupational Retirement Schemes Ordinance ("ORSO") to attract global talents who bring much needed skills and expertise to boost our economy.

Background

It is a criminal offence for an employer to operate a retirement scheme in Hong Kong unless the scheme is registered or exempted under ORSO. This offence applies equally to employers providing benefits to an international executive who is sent to Hong Kong to work on a temporary basis.

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Many global companies looking to set up or enhance a regional HQ in Asia will look to second one or more overseas executives to Hong Kong to work. Such executives will typically be a member of a retirement scheme in the executive's "home" country. The existing retirement scheme of which such an executive would be a member will almost certainly not be capable of being registered under ORSO. Therefore, if such legitimate schemes cannot be exempted under ORSO, then the employer can only choose between: -

- stopping the provision of such benefits for the concerned executive(s) (which would be a disincentive for these executives to move to Hong Kong) or
- sending the executive to another part of Asia to perform the required role (e.g. Singapore) or
- putting itself at risk of being prosecuted for a breach of ORSO.

It is therefore critically important that any regional / global employer can confidently determine as to whether the retirement scheme provided to their international mobile executives will be able to obtain an exemption certificate under ORSO, and indeed offer continuity of such executives' retirement scheme during their period of employment in Hong Kong.

Current Position Concerning the Exempt Schemes

Currently, retirement schemes can obtain exemption under ORSO either: -

- by means of having relatively few Hong Kong permanent identity cardholders as members (sections 7(4)(b) and (c)), or
- by demonstrating that the scheme is registered or approved by an "overseas authority" which performs functions generally analogous to those of the MPFA (section 7(4)(a)).

We understand that 97% of all exempt schemes are exempted under 7(4)(b) and (c); only 3% are exempted under 7(4)(a). The reason why the vast majority of schemes apply for exempt status under sections 7(4)(b) and (c) is because the requirements for such exemption are clear (basically they relate to the number / percentage of Hong Kong permanent identity cardholders in a scheme which is easy to measure).

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Proposed Changes to the ORSO

It is proposed deleting the exemption option under sections 7(4)(b) and (c). Following this deletion, the only option for exemption will be under section 7(4)(a).

Position of The Employers' Federation of Hong Kong

The Federation does not challenge the removal of the exemption provisions in sections 7(4)(b) and (c). We only believe that the implementation of section 7(4)(a) is inextricably linked to the removal of such sections 7(4)(b) and (c). As sections 7(4)(b) and (c) cease to apply, section 7(4)(a) will be the only section under which a scheme can obtain ORSO exemption. It is therefore critical that regional / international employers are provided with clarity as to how the exemption process in section 7(4)(a) will be implemented, especially including a guidance as to which "overseas authorities" satisfy the requirements of section 7(4)(a).

To use an analogy where compliance with ORSO is a raging river and the exemption methods are bridges. For nearly 25 years there have been two bridges available to employers to cross a raging river. Bridge A is the clear and certain path set out in sections 7(4)(b) and (c) (dealing with numbers of HKID cardholders). Nearly all employers crossed this "Bridge A" as it was easy to navigate. Now it is proposed that this bridge will be removed. This will mean that in the future, the only way for an employer to cross the raging river will be to use the "other" bridge, Bridge 7(4)(a). Therefore, whilst the Bill is telling employers that Bridge 7(4)(a) will continue to exist, it is very crucial to tell employers how to find this Bridge or how easy the Bridge is to cross. We strongly believe that it is also a common wish across industries and amongst global employers to have a clear path for staff coming to Hong Kong from overseas to maintain continuity of their existing retirement plan.

We appreciate that the MPFA recently published the "Additional Guidance Notes on Application for an Exemption Certificate under Section 7(4)(a)" and the "List of Authorities in a Country, Territory or Place outside Hong Kong for the purpose of section 7(4)(a) of the Occupational Retirement Schemes Ordinance (Chapter 426)" ("the List") covering five overseas authorities in respect of offshore schemes which are considered by the MPFA acting as the Registrar of the ORSO to be meeting the requirements of section 7(4)(a).

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Nevertheless, in order to ensure that Hong Kong remains to be a city of choice in which regional / global employers will base their Asian hubs and second staff both temporarily and permanently, only five overseas authorities being on the List is far from sufficient. In this regards, the Federation is always ready to render any assistance and if needed to provide more relevant information to facilitate the further enhancement of the List with the addition of more overseas authorities. In addition, in order to allow companies to file for exemption under the proposed new rules, we are also of the view that a sufficient and reasonable transition period should be provided to ensure that employers will be able to conform to the new rules without interrupting the current retirement benefits of their overseas employees to be based in Hong Kong. We have also made comments on some of the details stipulated in the Bill as attached at Annex.

The Federation believes that harmonious and fair employment relationships should be the essence of all occupational retirement schemes and supports the adoption of reasonable measures to ensure the effectiveness of the retirement market. We are always happy to work with the Bills Committee, the Government and the MPFA for improving Hong Kong's retirement system to our employees and serving to enhance Hong Kong's position as Asia's global city. Please feel free to contact Mr Louis Pong or Ms Jodi Koon of the Federation Office (tel: 2528 0033) should you need any clarifications.

Yours sincerely,

Alkin Kwong
Chairman

c.c. Dr David Wong Yau-kar, Chairman, MPFA
Ms Alice Law, Managing Director, MPFA

Annex

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No.	Proposed new section	Impact	Comment
(a)	**Section 2(1) – definition of "occupational retirement scheme"**	Why limit to schemes that can only admit *"eligible persons"*?	This will impact how some of the operative provisions (eg section 3) work. It will no longer be unlawful to have a "retirement scheme" provided that at least one member is a non-employee. Is this the intention? It seems to remove the original purpose of the 1995 legislation.
(b)	**Section 6A(g)**	Presumption of wrongdoing where failure to comply with guidelines.	-
(c)	**Section 7 (5B)**	Registrar can unilaterally *"impose conditions for exemption of the scheme that the Registrar considers appropriate"*. Can lead to removal of exemption certificate under 11(1)(ba).	This is a back door for the Registrar to impose additional, and potentially material, conditions on employers and their retirement schemes. This should be limited or removed.
(d)	**Section 10(1)(b)(ii)**	Annual statement of compliance with *"eligible person"* requirement for exempt schemes.	This seems to be overkill. The new legislation prohibits ineligible persons joining an exempt scheme. Why does the Registrar need the employer to confirm annually that it has complied with this aspect of the law (why not include other mandatory requirements also)?

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(e)	**Section 10(2), (3), (3A), (3B)**	Change "reasonable cause" to "reasonable excuse". (This appears throughout changes).	-
(f)	**Section 18(1)(b)**	Registrar needs to be satisfied that section 25(5) (new codification of trust law) has "*been complied with*".	This is difficult for the Registrar to determine. However, see also change to Schedule 1 Part 2 – Section 3 (in (o) below), where the legislation looks to impose this obligation on the employer!
(g)	**Section 18(1) – last line**	Previously the Registrar had to register the scheme if the conditions were satisfied ("*the Registrar **shall** allow the application*"), the proposed change gives the Registrar the discretion to refuse the application even if all conditions are satisfied ("*the Registrar **may** allow ...*" (emphasis added)).	This additional discretion granted to the Registrar should be a concern for employers. It simply increases the uncertainty of the position. How can this lack of clarity be good for Hong Kong?
(h)	**Section 18(4A)**	Equivalent to new section 7(5B), but for registered schemes. Gives Registrar broad powers to "*impose conditions for registration of the scheme that the Registrar considers appropriate*"	Same comment as for (c) above. This should be resisted.

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(i)	**Section 20A**	Renders void an unenforceable any term of a scheme that contravenes the relevant provisions in this Section. Note, uses the term "*member*" the definition of which has been deleted from section 2(1).	-
(j)	**Section 25(5)**	Codifies the general trust law obligations of a trustee.	This may operate to remove equitable remedies from a beneficiary.
(k)	**Section 30(2)**	Requires annual statement relating to "*eligible person*" membership for registered schemes. (As for 10(1)(b)(ii) for exempt schemes)	See (d) above.
(l)	**Section 33(1)**	The Registrar's power to demand information has been extended from the trustee/employer to any "person", <u>without limitation</u>.	This is a material extension of powers. It may result in persons only peripherally involved with a retirement scheme being obliged to provide information to the Registrar.
(m)	**Section 70B**	Can <u>only</u> transfer benefits between schemes where relevant employers agree. Existing provisions in schemes which provide that just the member could trigger a transfer (often with consent of trustee) will now become ineffective.	It is not clear why this is included. Schemes do exist which permit a Trustee to effect a transfer of benefits where the member/employee requests. Such provisions now become void. Why?

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(n)	**Schedule 1 Part 1 – Section 3**	The employer is being required to confirm that the Trustee has complied with its fiduciary obligations!	How can an employer satisfy itself that a Trustee (which will always include a non-employer trustee) has complied with its fiduciary obligations! This should not be imposed on the employer. If the registrar requires comfort on this then it should look to the Trustees, not the employers.

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